
PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



August 18, 2003

Agenda ID #2559

TO: PARTIES OF RECORD IN CASE 03-05-025

This is the draft decision of Administrative Law Judge Bemmesderfer. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ BEMESDERFER** (Mailed 8/18/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Utility Audit Company, Inc.,

Complainant,

vs.

Southern California Gas Company,

Defendant.

Case 03-05-025
(Filed May 15, 2003)**DECISION DISMISSING COMPLAINT****I. Background**

On May 15, 2003, Utility Audit Company (UAC) filed the complaint that initiated this adversary proceeding. The complaint alleged that for an unstated period of years, Southern California Gas Company (SoCalGas) had improperly billed a multi-family apartment complex in Santa Ana known as Village Meadows. The complaint further alleged that although SoCalGas had changed its billing practices to eliminate the alleged billing error, SoCalGas had refused to pay rebates to Village Meadows for allegedly improper bills rendered during the three years prior to the change in billing practices. The complaint asked us to order SoCalGas to make refunds for the prior three-year period.

On July 7, 2003, SoCalGas filed its answer. In addition to denying the allegations of the complaint regarding improper billing practices, SoCalGas also

asserted the affirmative defense of the statute of limitations, citing Public Utility Code § 736,¹ and separately moved to dismiss the complaint on that basis.²

On July 22, Utility Audit filed its reply. The reply disputes SoCalGas' account of the events giving rise to the complaint and further disputes the applicability of the State of Limitations. On August 6, with the permission of the assigned Administrative Law Judge, SoCalGas filed a further reply to the Utility Audit papers, disputing Utility Audit's interpretation of prior Commission decisions and re-asserting the Statute of Limitations defense. For purposes of this decision, we do not deal with the alleged factual and legal inaccuracies in the pleadings. We confine ourselves to addressing the applicability of the Statute of Limitations.

II. Need for a Hearing

No hearing is necessary to resolve the issues raised in this complaint because we grant the motion to dismiss as more fully stated in this decision. Accordingly, pursuant to Rule 6.1 of the Commission's Rules of Practice and

¹ Section 736 reads, in relevant part, "All complaints for damages resulting from the violation of any of the provisions of Sections 494 or 532 shall...be filed with the commission...within three years from the time the cause of action accrues, and not after. If claim for the asserted damages has been presented in writing to the public utility concerned within the period of three years, the period shall be extended to include six months from the date notice in writing is given by the public utility to the claimant of the disallowance of the claim, or any part or parts thereof specified in the notice." Sections 494 and 532 generally require regulated utilities to treat similarly situated customers equally and to refrain from price discrimination or imposing charges or fees not stated in their tariffs.

² *Motion of Southern California Gas Company (U 904 G) to Dismiss Complaint or, Alternatively, to Clarify that the Three-Year Statute of Limitations Govern This Proceeding.*

Procedure, Article 2.5 of those Rules ceases to apply to this proceeding, with the exception of Rule 7(b), which shall continue to apply.

III. Discussion

A. Standard of Review for Motions to Dismiss

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. (*Western Long Distance, Inc. v. Pacific Bell et al.* D.94-04-082, 54 CPUC2d 244, 249.)

B. SoCalGas's Motion to Dismiss

SoCalGas asserts the complaint must be dismissed because it is barred by the statute of limitations.³ We agree. Utility Audit asserts that SoCalGas first combined the meters at Village Meadows in 1989. SoCalGas asserts that it first combined the meters in 1993 in response to a decision of this Commission. Consequently, if there was a cause of action for improper billing, it either ceased to accrue in 1989, as alleged by Utility Audit, or in 1993, as alleged by SoCalGas. A complaint based on acts that took place prior to the change to combined-meter billing, whenever that change took place, had to have been brought within three years of the change, i.e. at the latest by some date in 1996. Utility Audit

³ The complaint failed to plead a basis on which UAC is entitled bring this action. UAC is not the customer nor did it present itself in the complaint as the customer's authorized agent. In its reply, Utility Audit stated that it "filed this complaint on behalf of Village Investments" but failed to state that Village Investments is the owner of Village Meadows. While we could dismiss the complaint on standing grounds, we decline to do so because the lack of standing could readily be cured by a representation agreement between Village Meadows and UAC, which could then re-file the complaint. That would bring the case back to the Commission with the same factual record and we would have to rule on it again.

points to the tolling language in the second sentence of § 736 as extending the statute to the present time. However, in the same pleading, Utility Audit admits that it did not seek refunds for the alleged utility billing error during the three-year statutory period:

“SoCalGas first combined the Lyon Street property in 1989. Mr. McDonald will testify that the reason ***he did not seek refunds for Lyon Street at that time*** was on account of the blackmail letter from SoCalGas.” Reply, page 4.
(Emphasis supplied.)

As the language of the statute makes explicitly clear, presenting a written claim for damages within the three-year period is the action that tolls the statute. Without that action, the statute continues to run. Although the complaint alleges that Utility Audit, in its representative capacity, was “blackmailed” by SoCalGas into failing to present a timely written claim, we need not consider Utility Audit’s motivation in ruling on the Statute of Limitations defense. Filing a written claim for damages is the only action that tolls the statute. That action was not taken. The statute was not tolled.

This conclusion is not affected by the fact that the prayer for relief in the complaint asks the Commission to order SoCalGas to pay a refund rather than award damages. Although the complaint is structured as a request for equitable relief, it is in substance a request for damages measured by the amount of the refunds allegedly due. As such, it is subject to the limitation period contained in § 736.

IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments on the draft decision were filed on _____ and reply comments were filed on _____.

V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Karl J. Bemmesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SoCalGas adopted combined-meter billing for the Village Meadows apartment complex at some point between 1989 and 1993.
2. The alleged billing errors all occurred prior to the adoption of combined-meter billing.
3. Pub. Util. Code § 736 imposes a three-year statute of limitation on actions to recover overcharges due to billing errors.
4. The complaint was filed in 2003.
5. No written demand for damages was presented to SoCalGas within the three years following the adoption of combined-meter billing.
6. No hearing is required to resolve this matter.

Conclusion of Law

The complaint is barred by the statute of limitations in Pub. Util. Code § 736.

O R D E R

IT IS ORDERED that:

1. The complaint of Utility Audit Company, Inc. is dismissed with prejudice.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.